

FINDINGS OF FACT

1. Debtor filed his voluntary Chapter 7 petition on February 2, 1988.

2. Debtor's Statement of Financial Affairs reveals that Debtor filed a bankruptcy case in 1973. The statement also reveals that the case of Rick Seibel v. Ryder Truck Rental, Inc., 3M Companies, was pending in the 3rd Judicial District Court, Salt Lake County, State of Utah, Case No. C84-841.

3. The Debtor did not claim any prospective proceeds of the personal injury action as exempt property.

4. Donald F. Neiman was appointed interim trustee on February 4, 1988, and thereafter became the regular trustee.

5. Debtor received his discharge on May 12, 1988.

6. The Trustee filed an application to employ attorneys to pursue the litigation in the State of Utah wherein Debtor was the plaintiff. James & Galligan, P.C. (now Michael J. Galligan Law Firm, P.C.), Des Moines, Iowa and Henriksen & Henriksen, P.C., Salt Lake City, Utah, were recommended as counsel. The compensation was to be that as set out in the agreement between the Debtor attorneys entitled "Authority to Represent."

7. The representation of personal injury counsel was on a forty (40) percent contingent fee agreement plus Debtor to pay all costs.

8. This application and recommendation was approved by order of June 27, 1989. The employment was approved subject to the limitations on compensation provided by 11 U.S.C. § 328.

9. The personal injury lawsuit was set for trial in the latter part of August 1991.

10. On September 3, 1991, Call addressed a letter to the Trustee advising that the case was being settled through the cooperation of Liberty Mutual Insurance, the workman's compensation carrier, which discounted its lien in order to accomplish the settlement. Call wanted to know if there were bankruptcy matters that required further action.

11. On September 27, 1991, the Trustee advised Call by letter that the terms of employment as approved by the Bankruptcy Court were based upon the original fee agreement entered into with Rick Seibel. The Trustee advised Call that there was no exemption in Iowa for the personal injuries. The Trustee also stated that he could proceed to have the Bankruptcy Court authorize the Trustee to allow a portion of the funds to remain with the Debtor. Otherwise, the balance of Debtor's portion of the settlement was an asset of the bankruptcy estate and should be forwarded to the Trustee. Further, the Trustee advised that he would have to make a report to the court regarding the professional fees since the professional appointment was subject to 11 U.S.C. § 328. The Trustee asked Call to advise him of the status of the matter.

12. Call responded to the Trustee's letter on November 20, 1991. Call advised the Trustee that "we did our own research, settled the case, and distributed the proceeds of the settlement."

Call advised that the proceeds were distributed as follows:

Liberty Mutual	\$34,166.00
Rick Seibel	30,000.00
Henriksen, Henriksen & Call, P.C.	
(attorney fees)	23,280.62
(costs)	8,365.86
Galligan Law Office	
(attorney fees)	11,640.31
(costs)	47.21

13. The Trustee first became aware that the personal injury litigation had been settled for \$107,500 in the letter of November 20, 1991.

14. Counsel for Debtor first became aware of the settlement and distribution of funds on or about December 3, 1991 when he received a communication from the trustee.

15. On December 24, 1991, Debtor amended Schedule B-4 of his petition by adding said personal injury lawsuit as exempt in the amount of \$30,000 pursuant to Iowa Code § 627.6.

16. Trustee promptly objected to said claim of exemption. The Trustee objected to the claim of exemption to the extent that the Debtor must show the exemption is claimed under the provisions of Iowa Code § 627.6(8)(e), and to the extent reasonably necessary for the Debtor's support.

17. Debtor filed his resistance to Trustee's Objection to Claim of Exemption on January 31, 1992. Debtor advised the Court at that time that \$30,000 had been received through a settlement of the personal injury lawsuit. Debtor advised the Court that the money had been spent as follows:

- a. \$17,000 had been paid to reimburse his mother for medicals and for support of Debtor;
- b. \$8,400 had been used to pay back rents owed for housing and keep during Debtor's injury and incapacitation;
- c. \$1,200 had been used to repair a motor for his automobile;
- d. \$2,500 had been used for payment on a semi-truck for income resources to enable Debtor to maintain income; and,
- e. \$300 had been paid to his attorney for attorney's fees owed in regards to the bankruptcy.

Debtor prayed that the Court approve the claim of exemption in the amount of \$30,000.

18. On March 25, 1992, Trustee filed his Motion for Turnover of Property of the Estate. This motion was directed to the Debtor, Rick A. Seibel, Debtor's counsel, John Call of Henriksen, Henriksen & Call, P.C., Salt Lake City, Utah, and Galligan & Conlin, Des Moines, Iowa, successor to James & Galligan, P.C.

DISCUSSION

PROPERTY OF ESTATE SUBJECT TO TURNOVER

11 U.S.C. § 541(a) provides the estate is comprised of all property, wherever located and by whomever held, in which the debtor has a legal or equitable interest as of the commencement of the case. This is a very broad provision, which encompasses nearly all interests including exempt property of the debtor.

Pursuant to 11 U.S.C. § 541(a), the Debtor's cause of action for personal injury and the proceeds thereof are property of the estate. See Cottrell v. Schilling (In re Cottrell), 876 F.2d 540 (6th Cir. 1989); In re Geis, 66 B.R. 563 (Bankr. N.D. Ga. 1986). On February 7, 1988, when the Debtor filed his voluntary chapter 7 petition, the commencement of the case, he owned a cause of action for personal injuries, which was pending in a state court in Utah. This personal injury lawsuit and its proceeds became property of the estate.

Outside of exceptions irrelevant in this case, 11 U.S.C. § 542(a) provides that an entity in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under § 363, or that the debtor may exempt under § 522, shall deliver to the trustee, and account for, such property or the value of such property. Property in the hands of a custodian is governed by 11 U.S.C. § 543. "Custodian" is defined in 11 U.S.C. § 101(11) and means, in general, a nonbankruptcy liquidator, such as a state court receiver, an assignee for the benefit of creditors, administrator, or other nonbankruptcy liquidating trustee. A custodian is not involved in this matter.

In this case proceeds from the personal injury litigation are property of the estate that the Trustee could use or that might go to Debtor as exempt. As such, the proceeds were subject to turnover pursuant to 11 U.S.C. § 542(a). The entire amount of the settlement should have been turned over

to the Trustee for distribution as governed by the Bankruptcy Code.

Fed.R.Bankr.P. 9019 provides, in relevant part, that on motion by the trustee, and after notice and hearing, the court may approve a compromise or settlement. The Henriksen Law Firm never permitted this process to be either initiated or completed but took the responsibility of approving the settlement upon itself and disbursed the funds.

There is no evidence that the settlement for \$107,500 is either unfair or inadequate, especially when the fact that the workman's compensation carrier had discounted its lien in order to effect the settlement. Accordingly, the Court will approve the settlement.

Rather than wait for action by the Trustee and Bankruptcy Court, Debtor's attorney in Salt Lake City distributed the proceeds without waiting for authority from the Trustee. In addition to the basic bankruptcy law principle that all of the debtor's property becomes property of the estate subject to the Bankruptcy Code, see generally Knaus v. Concordia Lumber Co. (In re Knaus), 889 F.2d 773, 775 (8th Cir. 1989), Call specifically knew that the Bankruptcy Court had jurisdiction over the assets of the estate. The order approving employment provided that compensation of personal injury counsel was to be according to the terms set forth in the agreement between said attorneys and Debtor, subject to the limitations on compensation as provided in 11 U.S.C. § 328. The agreed term of employment was on a contingent fee basis, which is

expressly provided for in § 328. However, § 328(a) additionally authorizes the court to deviate from such terms and conditions and to allow compensation different from that agreed upon after the conclusion of employment. Clearly, compensation for counsel is dependent upon a final review by the Court.

Call paid his firm \$23,280.62 in fees and \$8,365.86 in costs. He paid Galligan \$11,640.31 in fees and \$47.21 in costs. The Court preliminarily approved the contingent fee of 40% plus costs. The contingent fee would have totaled \$43,000 (\$107,500 x 40%). Personal injury counsel received a total of \$34,920.93 in fees so they discounted their fees. A total of \$8,413.07 was charged as costs. \$34,920.93 in fees plus \$8,413.07 in costs totals \$43,334 so personal injury counsel absorbed most of the costs. Under the circumstances, this is reasonable and should be approved.

Call distributed \$34,166 to Liberty Mutual. Liberty Mutual was Debtor's workman's compensation carrier and had a lien on the proceeds of the lawsuit for workman's compensation benefits and medical expenses incurred by Debtor during his disability. Liberty Mutual substantially discounted its claim and settled its claim of over \$70,000 for \$34,166. This is reasonable and the distribution of these funds should be approved.

Personal injury counsel distributed \$30,000 to the Debtor without notice to the Trustee or the Court. Debtor claims that this fund is exempt and he has already spent it. Debtor states

that he paid \$17,000 to his mother for prepetition debt; \$8,400 was spent on back rents, which was prepetition debt; \$1,200 was used to repair an automobile; and, \$2,500 was used for payment on a semi-truck for income resources. \$300 was paid to his bankruptcy attorney for fees owed from the bankruptcy. \$600 is not accounted for.

The general rule in a bankruptcy proceeding is that absent a conflict between the state law and federal bankruptcy law, the choice of law rules of the forum state apply. Compliance Marine, Inc. v. Campbell (In re Merritt Dredging Co., Inc.), 839 F.2d 203, 205-06 (4th Cir. 1988), cert. denied, 487 U.S. 1236 (1988); In re Presque Isle Apartments, L.P., 118 B.R. 332, 334 (Bankr. W.D. Pa. 1990). Iowa has adopted the "most significant relationship" rule in the choice of law area. That is, the Iowa courts apply the law of the jurisdiction that has the most significant relationship with the parties and the principal interest in the issue. Sedco Int'l, S.A. v. Cory, 522 F.Supp. 254, 313 (S.D. Iowa 1981)(citing Berghammer v. Smith, 185 N.W.2d 226, 230 (Iowa 1971)), aff'd, 683 F.2d 1201 (8th Cir. 1982), cert. denied, 459 U.S. 1017 (1982).

Iowa has the most significant relationship with the Debtor. At all material times herein Debtor was a resident of the State of Iowa. Debtor filed his bankruptcy in the Southern District of Iowa. He has never been a resident of Utah. The fact that a motor vehicle accident occurred in Utah and litigation proceeded in Utah as a result of that accident does

not alter this conclusion. Iowa is the state with the principal interest to protect. Accordingly, the Iowa law of exemptions applies in this case.

The Debtor's interest in the proceeds of the personal injury settlement are not exempt property under Iowa law. Iowa has opted out of the federal exemptions, Iowa Code § 627.10, and does not provide an exemption for personal injury settlements. In re Buchholz, No. X91-02345S, (Bankr. N.D. Iowa May 28, 1992). Accordingly, the proceeds are subject to turnover to the Trustee.

The Henriksen Law Firm's employment as counsel was expressly provided for pursuant to 11 U.S.C. § 327. Accordingly, said firm was employed pursuant to order of this Court and had a duty to this Court, as well as a duty to their client, the Debtor herein.

The Henriksen Law Firm had possession and control of the proceeds during the time that this bankruptcy case was pending, and is still pending, as the Trustee has not filed a final report, the final decree has not been filed, and the case has not been closed.

The Henriksen Law Firm knew that the Trustee had an interest in the proceeds of the personal injury lawsuit, as is evidenced by their letter of September 3, 1991. Rather than wait for a reply from the Trustee or initiating further contact with the Trustee, the Henriksen Law Firm distributed the funds without authority from either this Court or the Trustee.

The Henriksen Law Firm violated its duty to this Court to report the settlement and any proposed distribution of the proceeds. This firm intentionally diverted property of the estate to recipients without authorization from the Court or the Trustee. Accordingly, this firm is responsible for the funds.

The Michael G. Galligan Law Firm knew of the settlement on or about September 3, 1991. The division of the attorney's fees was agreed upon. The Galligan Law Firm had not participated in the trial or settlement of the case. This firm did not distribute nor did it direct the distribution of any of the proceeds. This firm has not exercised control or possession over the proceeds from the settlement of the lawsuit. Accordingly, it should not be responsible for the turnover of the fund.

11 U.S.C. § 521(4) provides that it is the duty of the debtor to surrender to the trustee all property of the estate.

Debtor came into the possession of \$30,000 and the record indicates that he did not advise his bankruptcy attorney of this fact and seek his advice about how this money was to be handled. Debtor has had a previous bankruptcy filing and his knowledge of bankruptcy law and procedure is something more than that gained by a person with first time contact with bankruptcy law.

Debtor claims he gave \$25,400 to his mother to satisfy prepetition debt. This was done in violation of his duty under § 521. Debtor is required to turn over the entire \$30,000 and

the Court will then decide what amounts, if any, may be exempted out of the estate.

It is urged that the delay by the Trustee in responding to Call's letter of September 3, 1991, constitutes a tacit statement that nothing further was required by the Trustee. The delay of approximately twenty-four days is probably longer than what one would think would be necessary, but it does not give tacit approval of the distribution of the proceeds of the settlement.

Finally, the Court rules that both Debtor and the firm of Henriksen, Henriksen & Call are jointly and severally liable for turnover of the \$30,000 in proceeds, which Attorney Call distributed without authorization to the Debtor. 11 U.S.C. § 542(a) clearly provides that an entity in possession, custody, or control of property of the estate shall deliver such property--or the value of such property--to the trustee. Attorney Call had possession, custody, or control of the proceeds of the personal injury lawsuit. Contrary to § 542(a), he failed to turn these funds over to the Trustee and, after exercising his own judgment, turned these funds over to the Debtor.

ORDER

IT IS ACCORDINGLY ORDERED that the distribution of the personal injury settlement funds already effected by Attorney Call is hereby approved as to the following funds:

- 1) attorney fees and costs in the total amount of \$43,334 distributed to Henriksen, Henriksen & Call, P.C. and to the Galligan law office;
- 2) \$34,166 to Liberty Mutual in satisfaction of its lien on the proceeds of the lawsuit as Debtor's workmen's compensation carrier.

IT IS FURTHER ORDERED that hearing on Trustee's objection to claim of exemption is continued upon further order of the Court pending receipt of the \$30,000 by the Trustee.

FINALLY, IT IS ORDERED that Trustee's motion for turnover of the balance of the personal injury settlement funds, \$30,000, is sustained and a judgment shall enter against Debtor, Rick Arthur Seibel, and Henriksen, Henriksen & Call, P.C., jointly and severally, for turnover of the funds to the Trustee.

Dated this 25th day of May, 1993.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE