

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

GUERIN ENTERPRISES, INC.,

Case No. 88-960-D H

Debtor.

Chapter 7

**ORDER--APPLICATION FOR ALLOWANCE OF FEES
OF CREDITOR'S ATTORNEY**

On November 1, 1990, a hearing was held on the application for allowance of fees and expenses by attorney Edward W. Dailey. Edward W. Dailey appeared pro se and for creditor Don C. Pease, Jr., A. Fred Berger appeared as Chapter 7 Trustee, and John Waters appeared as Assistant U.S. Trustee. At the conclusion of said hearing, the Court took the matter under advisement and now considers it fully submitted.

This is a core proceeding pursuant to 28 U.S.C. §157(b) (2) (A). The Court, upon review of the application, objection thereto, response to objection and arguments of counsel, now enters its findings and conclusions pursuant to Fed. R. Bankr. 7052.

FINDINGS OF FACT

1. Debtor filed a voluntary Chapter 7 petition on May 3, 1988.
2. On January 26, 1989, the Court entered an order approving A. Fred Berger as attorney for the estate.
3. A. Fred Berger filed Adversary Proceeding 89-00152, A. Fred Berger, Trustee of the Bankruptcy Estate of Guerin Enterprises, Inc. v. L. James Guerin, William Newman. Burlington Bank and Trust and G & N Distributing Company, Complaint for Determination of Debtor's Interest in Sale Proceeds and for Turnover of Assets and Judgment for Conversion.
4. The Court approved the application for interim fees of

attorney for the Chapter 7 Trustee, Trustee to make payment to attorney A. Fred Berger in the sum of \$16,153 .95.

5. The Trustee also filed an application for allowance of fees of attorney Edward W. Dailey, attorney for creditor Don C. Pease, Jr., stating, in part:

On his own initiative, Don C. Pease, Jr. hired attorney Edward W. Dailey to pursue extensive discovery of the business of G & N Distributing Company, the successor business of Guerin Enterprises, Inc.

Solely as a result of the efforts of Don C. Pease, Jr. and his attorney, attorney Edward W. Dailey, assets were discovered which have benefitted the bankruptcy estate by approximately \$60,000.00.

On the basis of quantum meruit, the fee application of attorney Edward W. Dailey should be allowed.

In the alternative, attorney Edward W. Dailey should be appointed as additional attorney for the bankruptcy estate of Guerin Enterprises, Inc., retroactive to the date of the filing of the bankruptcy.

6. The application for allowance of fees of attorney Edward W. Dailey seeks fees and expenses in the amount of \$14,700.41.

7. Adversary No. 89-00152 has been settled.

DISCUSSION

I. 11 U.S.C. § 503(b)

11 U.S.C. §503(b) (3) and 11 U.S.C. §503(b) (4) provide administrative expense compensation to certain creditors in a bankruptcy case and the attorney or accountant for said creditors in a bankruptcy case. 11 U.S.C. §503(b) (3) provides that the following are administrative expenses:

- (3) the actual, necessary expenses, other than compensation and reimbursement specified in 11 U.S.C. §503(b)(4), incurred by—
 - (A) a creditor that files a petition under 11 U.S.C. §303 (involuntary petition);
 - (B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;
 - (C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;
 - (D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under 11 U.S.C. §1102, in making a substantial contribution in a case under Chapter 9 or Chapter 11 of Title 11; or
 - (E) a custodian superseded under 11 U.S.C. §543, and compensation for the services of such custodian.

11 U.S.C. §503(b)(4) provides that the following is an administrative expense:

- (4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under 11 U.S.C. §503(b)(3), based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under Title 11, and reimbursement for actual, necessary expenses incurred by such attorney or accountant.

A few courts have allowed attorney fees pursuant to 11 U.S.C. § 503(b) (3) (B) and 11 U.S.C. § 503(b) (4) where the court has not previously approved the attorney's appointment. See In re Carpenter, 56 B.R. 704, 707 (Bankr. D.R.I. 1986); In re Rumpza, 54 B.R. 107, 109 (Bankr. D. S.Dak. 1985). However, the majority of courts have followed the plain language of 11 U.S.C. § 503(b) (3) (B) and 11 U.S.C. § 503(b) (4), and declined to award fees unless the Bankruptcy Code specifically authorizes payment and the attorney has received prior court approval. See In re Fall, 93 B.R. 1003, 1012 (Bankr. D. Ore. 1988); In re Monahan, 73 B.R. 543, 544 (Bankr. S.D. Fla. 1987); In re Romano, 52 B.R. 590, 593 (Bankr. M.D. Fla. 1985); In re Spencer, 35 B.R. 280, 281 (Bankr. N.D. Ga. 1983).

In the instant case, the Court follows the majority line of cases and denies the application for allowance of fees of attorney Edward W. Dailey. While creditor Don C. Pease, Jr. and attorney Edward W. Dailey may have provided benefit to the estate, they ignored the explicit requirements of 11 U.S.C. § 503(b) (3) (B) and 11 U.S.C. § 503(b)(4) by not seeking court approval prior to attempting to recover property transferred or

concealed by the Debtor. Early court involvement is required. This provides a procedure whereby controls are in effect preventing duplicative services and uncontrolled costs.

II. Nunc Pro Tunc Approval

As an alternative basis, the Chapter 7 Trustee requests nunc pro tunc approval of attorney Edward W. Dailey for the Guerin Enterprises, Inc. Chapter 7 estate. The Court rejects this request for the following reasons. First, nunc pro tunc approval of Edward W. Dailey as attorney for the Chapter 7 estate would allow the creditor's attorney to circumvent the statutory mandate of 11 U.S.C. § 503(b)(3)(B) and 11 U.S.C. § 503(b)(4). Further, the Chapter 7 Trustee, creditor Don C. Pease, Jr., and Edward W. Dailey have failed to assert the grounds warranting such an appointment set forth in In re Independent Sales Corporation, 73 B.R. 772 (Bankr. S.D. Iowa 1987) and In re All Iowa Transport Services, Inc., slip op. No. 85-364-C (Bankr. S.D. Iowa April 7, 1988). Specifically, they have not shown that prior approval would have been appropriate and the delay in seeking approval was due to hardship beyond the professional's control. Independent Sales Corp. at p. 777; All Iowa Transport Services, Inc. at p. 4.

ORDER

IT IS ACCORDINGLY ORDERED that the Application for Allowance of Fees of Attorney Edward W. Dailey is denied.

Dated this 29th day of March, 1991.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE