In Re Magar E. Magar, Case No. 301-33525-tmb11
BAP No. OR-02-1580-CRyMa Affirming Judge Brown

8/8/03 tmb Unplublished

Debtor filed objection to claim filed by law firm which represented him in litigation with Idaho Department of Environmental Quality. During the course of that representation the debtor attempted to terminate his contract with the firm, but the Idaho State Court Judge refused to allow the firm to withdraw, finding that the firm's representation was necessary to an orderly resolution of the dispute. The debtor conceded that he was indebted to the firm for services rendered before he attempted to terminate its services, but contended that he had no obligation to pay for services rendered after that time. He further contended that the fees were unreasonable in that he had done much of the legal work upon which the firm's filings were based and that a portion of the fees should be denied because the firm had failed to adequately itemize its fee statements. In addition, he contended that the firm was not entitled to prepetition interest on its claim.

The bankruptcy court overruled the objection, finding that the parties continued to be bound by the terms of their original engagement letter despite the debtor's unsuccessful attempt to terminate his relationship with the firm. It found that the fees were reasonable, despite any work done by the debtor, because the firm had a duty to conduct its own independent legal research and analysis rather than relying upon that provided by the debtor. The bankruptcy court rejected the debtor's contention that fees should be denied due to the firm's failure to itemize its fee statements, noting that there was no evidence that the debtor had ever objected to the form of the statements and that the debtor had failed to show that such itemization was required by Idaho law. Finally, the bankruptcy court found that the debtor had tacitly agreed to imposition of interest on the unpaid balance of his account by failing to object to such interest during the pendency of the firms representation and that, in any event, the firm was entitled to interest on its account under Idaho law.

The BAP affirmed the bankruptcy court on all counts. It concurred with the bankruptcy court's conclusion that the parties remained bound by the terms of their original contract despite the debtor's attempts to terminate that contract and with the bankruptcy court's conclusion that the firm's fees were reasonable. It also agreed that, under Idaho law, the firm was entitled to prepetition interest on its claim.

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

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| In re: | BAP No. OR-02-1580-CRyMa |
| MAGAR E. MAGAR, | BK. No. 301-33525-tmb11 |
| Debtor. | |
| MAGAR E. MAGAR, | |
| Appellant, | MEMORANDUM[1] |
| v. | |
| LANDECK, WESTBERG, JUDGE & GRAHAM, P.A., | |
| Appellee. | |

FILED

AUG 08 2003

NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

Argued and Submitted on July 25, 2003
at Seattle, Washington

Filed - August 8, 2003

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Trish M. Brown, Bankruptcy Judge, Presiding

Before: CARROLL,[2] RYAN, and MARLAR, Bankruptcy Judges.

[1] This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

[2] Honorable Peter H. Carroll, Bankruptcy Judge for the Central District of California, sitting by designation.

Debtor, Magar E. Magar ("Magar") appeals an order allowing the claim of Ronald J. Landeck and the law firm of Landeck, Westberg, Judge & Graham, P.A. ("Landeck") in the amount of $46,467.51 for attorney fees incurred representing Magar in a state court action. We AFFIRM.

## I. FACTS

On August 23, 1996, Magar retained Landeck to represent him in Case No. CV-92-00676, Magar E. Magar, d/b/a Syringa Mobile Home Park v. State of Idaho, Department of Health and Welfare, Division of Environmental Quality ("Idaho DEQ"), pending in the District Court, Latah County, Idaho. Magar and the Idaho DEQ were involved in a dispute concerning the quality of water provided to the residents of Magar's rental property, Syringa Mobile Home Park ("Syringa").

Prior to Landeck's retention, Magar had been ordered to appear in state court to show cause why he should not be held in contempt for his failure meet certain deadlines for remedial work on the Syringa water supply contained in a January 1996 settlement agreement[3] between the parties. On July 26, 1996, Magar failed to appear at the hearing as directed by the court. On August 19, 1996, an order was entered by the state court holding Magar in contempt and levying a fine of approximately $60,000. Magar was

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[3] In January 1996, the Idaho state court entered an order approving a settlement agreement between the parties which required Magar to take action to remedy problems with the Syringa water supply identified by the Idaho DEQ. The settlement agreement also set deadlines by which remedial actions were to be taken by Magar. The state court retained jurisdiction, but placed the case on inactive status.

ordered to comply with the settlement agreement in 30 days or be fined an additional $500 per day. On August 23, 1996, Landeck met with Magar and filed a notice of appearance in the state court action.

On August 27, 1996, Landeck sent Magar an engagement letter which requested a $3,000 retainer and stated that Magar would be billed on an hourly basis for legal services performed by the firm. The letter explained that Magar would receive statements on a monthly basis which were due upon receipt, and that unpaid bills would accrue interest at a rate of 1% per month. Finally, the letter pointed out that "[i]t would not be unlikely for this case to generate fees in the $10,000 to $20,000 range and possibly much more depending on the circumstances." [Engagement Letter (Aug. 27, 1996), at 1]. Magar did not sign or return the engagement letter to Landeck, claiming that the terms of the letter did not coincide with earlier representations by Landeck. By letter dated September 4, 1996, Magar terminated his professional relationship with Landeck. Two days later, Magar revoked his termination, retained Landeck and thereafter paid Landeck a retainer of $3,000 for legal services in the case.

Between September 6, 1996 and May 31, 1997, Landeck provided extensive legal services to Magar, including the preparation and filing of the following documents:

a. Magar's motion to allow Magar to respond to an Order to Show Cause and for Delay, and memorandum of points and authorities in support thereof;

b. Magar's motion for Order to Show Cause why the Idaho DEQ should not be ordered to approve or disapprove Magar's engineering reports and plans, and

c. Magar's application for appointment of a special master.

Landeck represented Magar at the hearings on the orders to show cause which commenced on May 9, 1997, and continued through May 15, 16 and 30, 1997.

By letter dated May 31, 1997, Magar asked Landeck to withdraw as counsel stating that he could no longer afford Landeck's services. Pursuant to Magar's request, Landeck immediately filed a motion seeking to withdraw as Magar's attorney of record in the state court action.

On June 6, 1997, the state court entered an order finding Magar in contempt for defaulting under the 1996 settlement agreement with the Idaho DEQ. The order, which effectively vacated the court's prior order entered August 19, 1996, imposed a $500 fine on Magar and an additional fine of $100 per day from May 31, 1997, until compliance with the terms of the settlement agreement. The court denied Magar's order to show cause directed to the Idaho DEQ, together with Magar's application for appointment of a special master.

On June 9, 1997, the court denied Landeck's motion to withdraw as counsel on the grounds that good cause had not been shown to justify the withdrawal. Landeck filed a second motion to withdraw as counsel supported by evidence that continued representation created a financial hardship on Magar. On July 21, 1997, the court denied the second motion finding that Landeck's continued representation of Magar was necessary to an orderly resolution of

the dispute.[4] Landeck continued to represent Magar until an Order of Withdrawal was entered on August 22, 2001.[5]

Between September 19, 1996 and April 16, 2001, Landeck sent Magar 56 monthly statements which described the legal services rendered and itemized the hours worked and amounts charged. Landeck's engagement letter stated that interest would be charged at a rate of 1% per month on delinquent accounts. However, Landeck did not begin charging Magar interest on unpaid invoices until May 1998, and only after Landeck had sent Magar a letter dated May 15, 1998, alerting him that interest would be charged on current and future invoices.

On April 17, 2001, Magar filed a voluntary petition under chapter 11 of the Bankruptcy Code. On August 13, 2001, Landeck timely filed a proof of claim in the amount of $46,467.51,

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[4] In its Order dated August 8, 1997, the Idaho court stated:

> This matter has progressed in an orderly fashion since Mr. Landeck has represented Mr. Magar in these proceedings. Mr. Magar did not appear for an earlier hearing in this matter. When he testified, the court concluded that at times he was not truthful. Mr. Magar contends he is unable to continue to pay Mr. Landeck. However, the court has reviewed Mr. Magar's financial statement and recent tax returns and finds this contention without merit. The court finds this matter will proceed in a more reasonable and appropriate manner if Mr. Landeck continues to represent Mr. Magar. The court does not find good cause sufficient to allow Mr. Landeck to withdraw as counsel.

[Order (Aug. 8, 1997), at 3].

[5] The Idaho court finally permitted Landeck to withdraw as counsel based upon Landeck's representation that the firm had an actual conflict of interest because Magar had objected to Landeck's proof of claim in his bankruptcy case.

representing the balance due by Magar for legal services rendered and costs advanced between August 23, 1996 and April 17, 2001.[6] On March 21, 2002, Magar filed an objection to Landeck's proof of claim pursuant to Fed. R. Bankr. P. 3007.[7] Magar asserted that (1) the amount charged exceeded the reasonable value of the services provided; (2) the time entries lumped services for more than one task making it impossible to determine the amount of time spent on any specific task, and (3) interest should not have accrued on the account.[8] On August 21, 2002, the bankruptcy court conducted an evidentiary hearing on Magar's objection to Landeck's claim. On September 20, 2002, the bankruptcy court entered oral findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052. On September 25, 2002, the court entered an order overruling Magar's

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[6] Landeck's proof of claim consists of $35,208.44 in unpaid legal fees, plus interest. Although Landeck was not permitted to withdraw until August 22, 2001, Magar admitted at oral argument that all of the legal services set forth in Landeck's proof of claim were rendered prior to commencement of the bankruptcy case.

[7] When a trustee is appointed in a chapter 11 case, the trustee is assigned the duty of objecting to claims. 11 U.S.C. § 1106(a)(1)(incorporating the duty set out in 11 U.S.C. § 704(5) in a chapter 11 case). Because a trustee had been appointed, Magar had no standing to object to Landeck's claim absent proof that the estate was solvent. See, e.g., In re Woods, 139 B.R. 876, 878 (Bankr. E.D. Tenn. 1992) (stating that the responsibility to examine and object to claims rests with the trustee); In re Stanley, 114 B.R. 777, 778 (Bankr. M.D. Fla. 1990) (holding that a debtor lacks standing to object to claims absent evidence that disallowance of claims would produce a surplus which would be available to the debtor). In this case, Magar explained at oral argument that the chapter 11 estate was solvent and that he had a pecuniary interest that would be affected by reduction of Landeck's claim.

[8] Interestingly, Magar conceded during the hearing on August 21, 2002 that he owed $31,143.28 to Landeck, of which amount the sum of $15,332.74 was incurred after May 31, 1997. [Appellant's ER 4, at 119].

objection and allowing Landeck's claim in the amount of $46,467.51. Magar timely filed a notice of appeal on October 1, 2002.

## II. ISSUES

a. Whether the bankruptcy court's findings concerning the existence and terms of a contract for legal services between Magar and Landeck were clearly erroneous.

2. Whether the bankruptcy court erred in finding that Landeck's attorney's fees were reasonable.

3. Whether the bankruptcy court erred in finding that Landeck was entitled to interest on its claim for attorney's fees.

## III. STANDARD OF REVIEW

Where the interpretation of a contract involves review of extrinsic evidence, a bankruptcy court's findings of fact are reviewed for clear error while the principles of law applied to those facts are reviewed *de novo*. Ankeny v. Meyer (In re Ankeny), 184 B.R. 64, 68 (9th Cir. BAP 1995). A bankruptcy court's decision concerning attorney's fees is reviewed under the abuse of discretion standard. McCutchen, Doyle, Brown & Enersen v. Official Comm. of Unsecured Creditors (In re Weibel, Inc.), 176 B.R. 209, 211 (9th Cir. BAP 1994). The bankruptcy court's factual findings are reviewed for clear error and its legal conclusions are reviewed *de novo*. Gordon v. Hines (In re Hines), 147 F.3d 1185, 1187 (9th Cir. 1998); Feder v. Lazar (In re Lazar), 83 F.3d 306, 308 (9th Cir. 1996). A bankruptcy court's award or disallowance of attorney's fees should be upheld on appeal absent an abuse of discretion or erroneous application of the law. Law Offices of Ivan W. Halperin v. Occidental Fin. Group, Inc. (In re Occidental Fin. Group, Inc.), 40 F.3d 1059, 1062 (9th Cir. 1994); Boldt v. Crake (In re Riverside-

Linden Inv. Co.), 945 F.2d 320, 322 (9th Cir. 1991). Finally, the question of whether interest is allowable under state law on a claim for unpaid attorney's fees is a question of law subject to *de novo* review. See Ankeny, 184 B.R. at 69 (stating that questions of law are reviewed *de novo*).

## IV. DISCUSSION

A duly executed proof of claim is *prima facie* evidence of the validity and amount of a claim. Fed. R. Bankr. P. 3001(f). See Diamant v. Kasparian (In re S. Cal. Plastics, Inc.), 165 F.3d 1243, 1247-48 (9th Cir. 1999); Ankeny, 184 B.R. at 69. The claim is deemed allowed, absent objection by a party in interest. 11 U.S.C. § 502(a). See Irvine-Pacific Commercial Ins. Brokers, Inc. v. Adams (In re Irvine-Pacific Commercial Ins. Brokers, Inc.), 228 B.R. 245, 246 (9th Cir. BAP 1998). The burden of tendering sufficient evidence to overcome the *prima facie* validity of a properly filed claim is on the objecting party. See Lundell v. Anchor Constr. Specialists, Inc., 223 F.3d 1035, 1039 (9th Cir. 2000); In re Global W. Dev. Corp., 759 F.2d 724, 727 (9th Cir. 1985). "If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence." Lundell, 223 F.3d at 1039, quoting In re Allegheny Int'l, Inc., 954 F.2d 167, 173-74 (3d Cir. 1992). The ultimate burden of persuasion still rests on the claimant to prove its claim by a preponderance of the evidence. Lundell, 223 F.3d at 1039; In re MacFarlane, 83 F.3d 1041, 1044 (9th Cir. 1996); In re Holm, 931 F.2d 620, 623 (9th Cir. 1991).

A. Basis for Landeck's Fees

In Idaho, an attorney's claim for compensation for professional services must rest upon a contract for employment, express or implied, made with the person sought to be charged. Clements v. Jungert, 408 P.2d 810, 815 (Idaho 1965). An implied in fact contract is defined as "one where the terms and existence of the contract are manifested by the conduct of the parties with the request of one party and the performance by the other often being inferred from the circumstances attending the performance." Fox v. Mountain West Elec., Inc., 52 P.3d 848, 853 (Idaho 2002); see Clements, 408 P.2d at 815. An implied in fact contract is grounded in the parties' agreement and tacit understanding. Fox, 52 P.3d at 853; see McKevitt v. Golden Age Breweries, Inc., 126 P.2d 1077, 1081 (Wash. 1942) (observing that "if an attorney renders valuable services . . . to one who has received the benefit thereof, a promise to pay the reasonable value of such services is presumed unless the circumstances establish the fact that such services were intended to be gratuitous").

While disputing the existence of any express contract with Landeck, Magar concedes there was an implied contract to pay Landeck's reasonable attorney's fees until May 31, 1997.[9] However, Magar denies the existence of an implied contract with Landeck for services rendered after May 31, 1997, reasoning that he effectively had no ability to reject Landeck's services after the state court

[9] Magar admits that "[p]rior to May 31, 1997, there was an implied contract to compensate Landeck for the reasonable value of his services and this contract is implied from the actions of both Debtor and Landeck." [Appellant's Opening Brief (Feb. 21, 2003), at 7].

denied Landeck's motion to withdraw as counsel. Magar argues that acceptance of the benefit of Landeck's services after May 31, 1997 did not create an implied promise to pay, citing Felton v. Finley, 209 P.2d 899 (Idaho 1949).

In Felton, an attorney who was obligated under an express contract to represent two heirs in a will contest sought to represent all heirs in the litigation. However, the balance of the heirs were opposed to the will contest at the onset and would not, and did not, have anything to do with it. They never conferred with the attorney nor encouraged him to contest the will on their behalf. Notwithstanding the indirect benefit received by the heirs at the conclusion of the litigation, the court held that acceptance of benefits does not, of and by itself, create an implied contract to pay, stating that the attorney performed legal services with knowledge that the parties sought to be charged would not employ him and had refused his services from the inception. Id. at 903.

Under no circumstances does Felton stand for the proposition that denial of Landeck's motion to withdraw as counsel terminated Landeck's attorney-client relationship with Magar and Magar's implied contract to pay the reasonable value of Landeck's continuing legal services in the state court action.

Idaho courts are authorized to grant leave to withdraw as counsel only upon a showing of good cause and such conditions "as will prevent any delay in determination and disposition of the pending action and the rights of the parties."[10] The state court

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[10] Rule 11(b)(2) of the Idaho Rules of Civil Procedure (continued...)

twice refused to allow Landeck to withdraw as counsel, finding that Landeck's continued representation of Magar was essential to an orderly resolution of the dispute with the Idaho DEQ.[11] Idaho Rule 11(b)(2) cannot be warped into an exception excusing Magar from his contractual obligation to pay Landeck the reasonable value of his legal services after May 31, 1997.

The bankruptcy court found that:

> At the time it began its representation of the debtor the Landeck firm sent him an engagement letter setting forth the terms of its representation of him. . . . [I]t advised the debtor that he would be charged . . . by the hour for services provided by the Landeck firm and that he would be charged interest on any balance outstanding on his account. . . .
>
> By engaging the Landeck firm to represent him, the debtor tacitly agreed to the terms of the engagement letter and is bound by them.

[Tr. of Proceedings (Sept. 20, 2002), at 120-21]. The bankruptcy court also found no difference between Magar's obligation to pay

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[10](...continued)
("I.R.C.P.") states:

> Except as otherwise provided by this Rule 11(b) and its subsections, or by stipulation and order of the court, no attorney may withdraw as an attorney of record for any party to an action without first obtaining leave and order of the court upon a motion filed with the court, and a hearing on the motion after notice to all parties to the action, including the client of the withdrawing attorney. Leave to withdraw as counsel of record may be granted by the court for good cause and upon such conditions or sanctions as will prevent any delay in determination and disposition of the pending action and the rights of the parties. . . .

I.R.C.P. 11(b)(2)(2002).

[11] See Footnote 4, supra.

for work performed by Landeck before or after May 31, 1997, noting that

> The parties were reluctant companions, but companions nonetheless. The relationship continued to be governed by the terms of the August 27, 1996 engagement letter. Consequently, I find that the work performed by the Landeck firm was neither unnecessary nor excessive.

[Tr. of Proceedings (Sept. 20, 2002), at 123].

Having found a tacit agreement between the parties, the bankruptcy court did not err in determining that there was an implied in fact contract for legal services between Magar and Landeck, and its findings were not clearly erroneous.[12]

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[12] Magar argues, apparently for the first time on appeal, that "[T]he only way Landeck could recover after May 31, 1997 would be on a quasi-contract theory . . . ." [Appellant's Opening Brief (Feb. 21, 2003), at 5]. Citing Restatement of Restitution § 60, Magar asserts that Landeck is not entitled to restitution for the reasonable value of his services after May 31, 1997 under a contract implied in law because the state court's denial of Landeck's motion to withdraw imposed a continuing duty on Landeck to represent him in the state court action.

Section 60 of the Restatement of Restitution states that "[a] person who has performed a duty owed to another, enforceable at law or in equity, is not entitled to restitution from the other for such performance, although the performance was induced by mistake or by the fraud of the other. Restatement of Restitution § 60 (1958). Comment "a" to § 60 further states that "if a person performs an act that is his legal duty - whether such a duty is enforceable by law or in equity - he is not entitled to restitution, irrespective of the cause of the act." Restatement of Restitution § 60, Comment a (1958).

Magar's argument is flawed for at least two reasons. First, there was an implied in fact contract between Landeck and Magar whereby Landeck would be compensated for legal services rendered to Magar. Denial of Landeck's motion to withdraw did not create or impose any new duties upon Landeck. The parties remained under the same contractual obligations as before. Second, the Restatement of Restitution § 60 only applies when an individual is already legally bound to perform a duty. An individual is not entitled to restitution because he or she would be bound under a contractual agreement wherein there would already be consideration for his or her performance. Section 60 is intended to prevent double recovery. Here, Magar argues (continued...)

B. Reasonableness of Landeck's Fees

Magar asserts that the bankruptcy court erred in finding that Landeck's fees were reasonable, arguing that much of the work performed by Landeck was either excessive or unnecessary. Magar claims that Landeck did not do any independent research, but simply revised arguments that he provided to the firm. Magar further claims that Landeck billed for work performed for other parties, and charged him for briefs produced but not submitted.

At the hearing on August 21, 2002, Mr. Landeck testified concerning the legal services rendered to Magar in the state court action. The bankruptcy court also heard testimony from Stephen V. Goddard, who witnessed the services being rendered as counsel for the Idaho DEQ, and District Judge John Robert Stegner, who presided at the hearings. Mr. Landeck testified that the firm did not rely solely on Magar's pleadings, but rather engaged in significant independent legal research and analysis.[13] Magar did not offer any

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[12](...continued)
that Landeck is not entitled to compensation for legal services accepted by Magar after May 31, 1997, under either a contract implied in fact or contract implied in law. Magar's argument circumvents the intent of the drafters as it prevents any recovery whatsoever. Magar received valuable legal services, a benefit which would be inequitable for him to retain without payment.

[13] Specifically, Landeck stated under oath:

> Now, during [Mr. Magar's] testimony I think he would like the Court to believe that his work was adequate to be presented verbatim. . . . [T]here are . . . essentially major changes to the various documents that Mr. Magar attempted to use or provide me.
>
> I did review his work . . . I did independent research. Ultimately . . . an attorney is responsible for his work (continued...)

evidence to show that Landeck's services were excessive or unnecessary nor that the fees sought for such services were unreasonable. Based upon the evidence in the record, the bankruptcy court found that Landeck's legal services were neither unnecessary or excessive, stating:

> [A]s the debtor's attorney, the Landeck firm had an obligation to conduct its own independent research . . . and to present its arguments in a format that it believed was most likely to obtain a favorable result for its clients, which occurred. . . .
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> Despite the debtor's requests, the Landeck firm would have been remiss in simply accepting his pleadings and filing them without conducting its own research and revisions.
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> This is particularly true in light of the fact that one of the reasons that Judge Stegner refused to allow the Landeck firm to withdraw was his concerns that the pleading filed by the debtor would be frivolous. . . .
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> Mr. Goddard, the attorney representing the Idaho DEQ, stated that he found the pleadings filed by the Landeck firm to be well drafted and their arguments well made.
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> The Court is familiar with the quality of the debtor's work both in this case and by the exhibits submitted by the debtor. I am convinced that the Landeck firm provided competent and

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[13](...continued)
product, and I was responsible to Mr. Magar and to representing him in a way that I judged to be in his best interest.

I took what I could from Mr. Magar. I rejected the rest. All of the documents that I filed were my work product, some of which were relied heavily [sic] from work that Mr. Magar had done, some of which did not. But I was satisfied with every pleading that I made, and I told Mr. Magar . . . that I would not rubber stamp his work.

[Mr. Magar] was not very organized. He did not know legal procedure in Idaho. His writing . . . is not very persuasive; rather it tended to, oh, whine and reiterate maybe issues that were not relevant, bringing in a lot of extraneous material and the like. I was not going to use that as my own work product and did not.

[Tr. of Proceedings (Aug. 21, 2002), at 85-86].

> necessary services to the debtor. Moreover, while the debtor provided drafts and research to the Landeck firm, I find that it added structure and organization to the arguments of those made by the debtor and that such services were of great value to the debtor. . . .
>
> Good lawyers take the time necessary to make clear, concise and well-organized arguments. True, the Landeck firm spent more time than the debtor would have if he had done the pleadings, but that is reflected in the quality of its work.

[Tr. of Proceedings (Sept. 20, 2002), at 121-23].

Magar also argues the bankruptcy court had insufficient evidence upon which to base a finding that Landeck's fees were reasonable because the bulk of Landeck's services were "bundled," rather than itemized, in the proof of claim.

Rule 54(e)(3) of the Idaho Rules of Civil Procedure, which identifies the factors which an Idaho state court must consider in awarding attorney's fees in a civil action,[14] does not prohibit the

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[14] Rule 54(e)(3) of the Idaho Rules of Civil Procedure states:

> In the event the court grants attorney fees to a party or parties in a civil action it shall consider the following factors in determining the amount of such fees:
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> (A) The time and labor required.
> (B) The novelty and difficulty of the questions.
> (C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.
> (D) The prevailing charges for like work.
> (E) Whether the fee is fixed or contingent.
> (F) The time limitations imposed by the client or the circumstances of the case.
> (G) The amount involved and the results obtained.
> (H) The undesirability of the case.
> (I) The nature and length of the professional relationship with the client.
> (J) Awards in similar cases.
> (K) The reasonable cost of automated legal research (Computer Assisted Legal Research), if

(continued...)

bundling of time entries in conjunction with an award of attorney's fees under state law. Magar cites All Am. Realty v. Sweet, 687 P.2d 1356 (Idaho 1984) for the proposition that Idaho law prohibits "bundling." However, in All Am. Realty, the court reversed a $7,000 award of attorney's fees on appeal and remanded the case, finding that the trial court had failed to make appropriate findings under the standard set forth in I.R.C.P. 54(e)(3). Id. at 1358. All Am. Realty did not hold that itemization is a condition to allowance of fees in state court.

In re RBS Indus., Inc., 104 B.R. 579 (Bankr. D. Conn. 1989), on which Magar relies, is inapposite. In RBS Industries, the court allowed $350,000 of a $400,000 interim fee request by chapter 11 debtor's counsel and denied the balance without prejudice, holding that the time records supporting the remaining $50,000 did not satisfy the degree of specificity required by Rule 2016(a) of the Federal Rules of Bankruptcy Procedure. Id. at 582. Rule 2016(a) is inapplicable because Landeck was not employed as a bankruptcy professional in this case and all of his fees were incurred representing Magar in state court prior to bankruptcy.

The bankruptcy court addressed the issue of "bundling" in reviewing Landeck's fees, stating:

> Nor am I persuaded that the fees incurred by the firm should be reduced because of its practice of lumping time

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[14](...continued)
> the court finds it was reasonably necessary in preparing a party's case.
> (L) Any other factor which the court deems appropriate in the particular case.

I.R.C.P. 54(e)(3)(2002).

> on several projects under a single time entry. In this court, because all fees which are to be paid from the estate are subject to approval of the Court, we do require that attorneys individually list time spent on each specific task. However, the debtor failed to show that the billing methods employed by the Landeck firm are contrary to the policies of the Idaho state court. Further, there is no evidence that the debtor objected to the form of the Landeck firm's bills at any time during the five years that he was represented by it.

[Tr. of Proceedings (Sept. 20, 2002), at 123].

Magar offered no evidence that he had either specifically objected to the "bundled" entries contained in statements received from Landeck or demanded that Landeck submit itemized statements describing the nature and extent of the legal services rendered on his behalf.[15] In short, Magar did not offer any evidence to overcome the *prima facie* validity of Landeck's proof of claim.[16] Magar failed to establish that the bankruptcy court abused its discretion in reviewing Landeck's fees, or that allowance of Landeck's fees as set forth in its proof of claim was clearly erroneous.

C. Interest on Landeck's Fees

Finally, Magar contests the allowance of interest that accrued prior to bankruptcy on Landeck's unpaid fees on two grounds: (a) there was no agreement with respect to interest on the unpaid fees, and alternatively, (b) Idaho state law permits interest to accrue on an open account only after the expiration of three months from

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[15] Indeed, Magar admitted at oral argument that he did not take any action upon receipt of Landeck's monthly statements to object to the format of the statements nor request more detailed time entries from the firm.

[16] As previously noted, Magar conceded during the hearing that a debt was owed to Landeck of not less than $31,143.28.

the date of the last item.[17] Because the last entry on Landeck's statement is dated March 12, 2001, Magar reasons that no interest should have accrued on the entire account until June 2001.

The bankruptcy court found an implied agreement between Magar and Landeck for the payment of interest on Landeck's unpaid legal fees:

> I also find that the Landeck firm's entitled to interest on the unpaid balance due on the debtor's account. The debtor tacitly agreed to the imposition of interest by engaging the Landeck firm to represent him after being advised that it would charge him interest on any unpaid balance owing on his account. At the time the Landeck firm began charging interest on the account, it informed the debtor that it intended to do so, and he failed to object. Nor did he object to the imposition of [sic] any time during the three years during which he received invoices on which interest was stated.

[Tr. of Proceedings (Sept. 20, 2002), at 124]. The bankruptcy court further found that, even if there was no implied agreement, Idaho Code § 28-22-104 provided an independent basis for Landeck's

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[17] Section 28-22-104(1) of the Idaho Code states:

> (1) When there is no express contract in writing fixing a different rate of interest, interest is allowed at the rate of twelve cents (12 cent(s)) on the hundred by the year on:
>
> 1. Money due by express contract.
> 2. Money after the same becomes due.
> 3. Money lent.
> 4. Money received to the use of another and retained beyond a reasonable time without the owner's consent, express or implied.
> 5. Money due on the settlement of mutual accounts from the date the balance is ascertained.
> 6. Money due on open accounts after three (3) months from the date of the last item.

Idaho Code § 28-22-104 (Michie 2002) (emphasis added).

recovery of pre-petition interest on its unpaid fees:

> Finally, I note that under Idaho law the Landeck firm's entitled to charge interest on the unpaid balances due on the debtor's account regardless of any agreement between them. See Idaho Code, Section 28-22-104.

[Tr. of Proceedings (Sept. 20, 2002), at 124].

An open account is an account kept open in anticipation of future transactions. On the other hand, an account stated is an account in which the balance has been ascertained and mutually agreed to by the parties. M.T. Deaton & Co. v. Leibrock, 759 P.2d 905, 907 (Idaho Ct. App. 1988). Because assent may be implied from a failure to object to a billing within a reasonable period of time, any written account may become an account stated through acquiescence in its correctness. Id. It is undisputed that Magar failed to object to the substance of the monthly statements received from Landeck until after the bankruptcy petition was filed. Having failed to object to the billings within a reasonable period of time, Magar's account with Landeck was an account stated upon which the accrual of interest was authorized under state law. Id. § 28-22-104(1)(2). Therefore, the bankruptcy court's findings of fact with respect to the allowance of interest accruing on Landeck's claim prior to Magar's bankruptcy comport with applicable law and constitute an appropriate exercise of discretion.

D. Landeck's Request for Costs, Damages and Attorney Fees

Landeck requests an allowance of costs under Fed. R. Bankr. P. 8014 or, alternatively, Fed. R. App. P. 39,[18] together with an award

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[18] Under BAP Rule 8018(b)-1, we may apply the Federal Rules of Appellate Procedure where the Bankruptcy Rules or the BAP Rules are (continued...)

of damages pursuant to 28 U.S.C. § 1912. [Appellee's Brief (April 7, 2003), at 25]. Rule 8014 provides that:

> Except as otherwise provided by law, agreed to by the parties, or ordered by the district court or the bankruptcy appellate panel, costs shall be taxed against the losing party on an appeal. If a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court. Costs incurred in the production of copies of briefs, the appendices, and the record and in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal and the fee for filing the notice of appeal shall be taxed by the clerk as costs of the appeal in favor of the party entitled to costs under this rule.

Fed. R. Bankr. P. 8014 (emphasis added). Landeck is entitled to costs under Rule 8014 which are taxed by the filing of an appropriate bill of costs with the clerk of the bankruptcy court. See 9th Cir. BAP R. 8014-1.

Title 28, section 1912 of the United States Code states:

> Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

28 U.S.C. § 1912. Because the statute applies only to judgments affirmed by the Supreme Court or a court of appeals, Landeck's request for damages and costs, including reasonable attorney fees, under 28 U.S.C. § 1912 is denied.

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[18](...continued)
silent as to a particular matter. See Robinett v. United States (In re Robnett), 165 B.R. 272, 274 (9th Cir. BAP 1994) (construing former BAP Rule 13). We will apply Fed. R. Bankr. P. 8014 and BAP Rule 8014-1 which address specifically the taxation of costs in appeals adjudicated by the bankruptcy appellate panel.

## V. CONCLUSION

The bankruptcy court did not err in finding an implied contract for legal services between Magar and Landeck, nor in finding that Landeck's fees for services rendered pursuant to such contract were reasonable. Nor were the bankruptcy court's findings of fact with respect to the allowance of interest accruing on Landeck's claim prior to Magar's bankruptcy clearly erroneous or an abuse of discretion.

AFFIRMED.

U.S. Bankruptcy Appellate Panel
of the Ninth Circuit
125 South Grand Avenue, Pasadena, California 91105
Appeals from Central California (626) 229-7220
Appeals from all other Districts (626) 229-7225

# NOTICE OF ENTRY OF JUDGMENT

BAP No. OR-02-1580CRyMa

RE: MAGAR E. MAGAR

A separate Judgment was entered in this case on 8/8/03.

BILL OF COSTS:

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken.
9th Cir. BAP Rule 8014-1

ISSUANCE OF THE MANDATE:

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. See Federal Rule of Appellate Procedure 41.

APPEAL TO COURT OF APPEALS:

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the $105 filing fee and a copy of the order or decision on appeal. Checks may be made payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.

CERTIFICATE OF MAILING

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The undersigned, deputy clerk of the U.S. Bankruptcy Appellate Panel of the Ninth Circuit, hereby certifies that a copy of the document on which this stamp appears was mailed this date to all parties in interest as designated by the Appellant in the Notice of Appeal.

By: Elaine Lewis Elaine Lewis 8/8/03

Deputy Clerk: August 8, 2003