

Trustee's final account
Errors and Omissions Insur.

U & R Express 693-62125-fra7

6/28/2001

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The trustee submitted his final account at the conclusion of administration of the case. The United States Trustee (UST) objected to the request for reimbursement from estate assets of a portion of the premium paid by the trustee for a private errors and omissions insurance policy. It was the trustee's policy to allocate a portion of the premium cost to each of the trustee's asset cases on a pro rata basis. The UST argued that the UST provides a blanket bond for all Chapter 7 trustees which would cover any losses occasioned by the negligence of a trustee. If a trustee desires to carry a private E & O policy, it would be duplicative of the bond coverage and should not be paid from estate assets.

In sustaining the UST's objection, the court held that the bond does cover losses sustained from a trustee's negligent conduct and that the premium for the E & O policy was an overhead expense not properly paid out of estate assets. The court also opined that there may be instances where a trustee may properly obtain an E & O policy as a condition for taking a particular case due to extraordinary conditions, the cost of which may be paid out of estate assets of the particular case. A showing of extraordinary circumstances was not made in this case, however.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 693-62125-fra7
U & R EXPRESS,)
) MEMORANDUM OPINION

Debtor.)

I. INTRODUCTION

After a lengthy administration of this complex case, the Trustee has submitted its final report. The United States Trustee ("UST") has objected to one aspect of the trustee's account: the trustee's election to pay, from assets of the estate, a portion of its annual premiums for errors and omissions insurance. I find that these expenses are not properly chargeable to the estate, and sustain the objection.

II. FACTS

Michael A. Grassmueck, Inc. is the duly appointed and serving trustee in this case. As reflected by its final account, the Trustee has charged to the estate the sum of \$4,111.80 for a portion

1 of errors and omissions premiums paid during the administration of
2 the case.

3 The Trustee carries a \$1 million insurance policy,
4 indemnifying the Trustee against loss arising from its errors or
5 omissions, and for related defense expenses. The policy is renewed
6 annually. The cost of the policy is allocated to the Trustee's
7 asset cases on a pro rata basis. The amount attributable to each
8 case is calculated according to the ratio of the funds held in the
9 case to the funds held by the Trustee in all cases in which he holds
10 funds. There does not appear to be any consideration given, or
11 adjustment made, in light of the nature of assets held, whether the
12 Trustee is conducting any business, or other risk factors a
13 particular case may present to the Trustee.

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III. DISCUSSION

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A trustee is entitled to reimbursement by the estate for its actual and necessary expenses incurred in the administration of the estate. 11 U.S.C. § 330(a)(1)(B). This section authorizes recovery of expenses necessarily incurred in the administration of a particular case, but does not authorize recovery of general overhead necessary for the maintenance of the trustee's business. In re United States Trustee, 32 F.3d 1370 (9th Cir. 1994); In re Williams, 102 B.R. 197 (Bankr. N.D. Ca. 1989). As the Williams Court put it:

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The Court will not award a trustee anything for the normal expenses of running his or her office. Thus, normal stationary, clerical, and telephone charges will not be allowed as expenses under § 330(a)(2). However, recovery will be allowed for extraordinary

1 expenses to the extent they are associated with the
2 *special needs* of an individual case and are *fully*
documented. [Emphasis in original.]

3 The Williams Court went on to hold that an expense is not
4 "actual," and therefore not reimbursable, if undocumented, or based
5 on some sort of formula or pro rata allocation.

6 While liability insurance premiums may be less prosaic than
7 stationary or phone bills, they are still part of the general cost
8 of operating a business, including that of a bankruptcy trustee.
9 The insurance coverage purchased by the Trustee in this case extends
10 not only to claims arising from the Trustee's official conduct, but
11 any other claim that may be made against it in its professional
12 capacity.¹

14 ¹The policy in this case provides:

15 The Company [insurer] will pay on behalf of the **Insured Damages** which
16 the **Insured** shall become legally obligated to pay and the Defense
17 Expenses as a result of any **Claim** first made against the **Insured**
18 during the **Policy Period** for a **Wrongful Act** first committed on or
19 after the retroactive date stated in ITEM 7 of the declarations. As
20 part of and subject to the applicable limits of liability, the
21 Company shall have the right and duty to defend any such **Claim**, even
22 if the **Claim** is groundless.

23 The policy includes the following definitions:

24 '**Claim**' means any civil action, suit, proceeding or demand by any
25 person or entity seeking to hold the **Insured** responsible for money
26 damages as a result of a **Wrongful Act** actually or allegedly committed
by the **Insured** or by any other person for whose **Wrongful Acts** is
legally responsible.

'**Wrongful Act**' means any actual or alleged act, error or omission
committed solely in the performance of, or failure to perform
Professional Services. [Bold type in original]

The policy elsewhere describes "professional services" as services
performed for others for a fee, and which are listed in item 6 of the

(continued...)

1 The Trustee argues that the acquisition of liability
2 insurance was necessary and appropriate for the administration of
3 the estate, because it protected the estate against losses
4 occasioned by negligence of the Trustee, and provided for the cost
5 of legal defense in the event any negligence claim was asserted.
6 The Trustee's bond does not provide such protection, it is argued,
7 because the duty of the surety under the bond is limited to
8 instances where the trustee has engaged in willful misconduct.

9 11 U.S.C. § 322(a) requires that any person acting as a
10 trustee under the Bankruptcy Code file with the Court a bond in
11 favor of the United States "conditioned on the faithful performance
12 of [the trustee's] official duties." To satisfy this requirement,
13 the United States Trustee has acquired a "blanket" bond in which all
14 panel trustees of the region are named as principals. The liability
15 of the surety is derivative, and depends on the trustee's liability.
16 In re Oles Grain Co., 206 B.R. 126 (Bankr. N.D. Tex. 1997); In re
17 Rosenberg Auto Parts, Inc., 209 B.R. 668 (Bankr. W.D. Pa. 1997).
18 The purpose of Code § 322 is to provide to the estate protection
19 against any loss occasioned by the trustee's failure faithfully to
20 perform its official duties. Faithful performance is not limited to
21 lawful or honest conduct, but also includes a duty to exercise the

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23 ¹(...continued)
24 declarations. The policy declarations are not included in the record. If the
25 Trustee offers services apart from its bankruptcy practice, the effect of
26 allocating some of the premiums to bankruptcy cases is an inappropriate subsidy
of the non-bankruptcy practice.

1 level of due care expected of the trustee: in other words, to avoid
2 negligence. The bond does protect the estate against losses
3 occasioned by the trustee's negligent conduct. In re Reich, 54 B.R.
4 995 (Bankr. E.D. Mich. 1985). It follows that the Trustee's errors
5 and omissions coverage was not required to protect the estate.

6 The Trustee goes on to argue that, even if the bond
7 indemnifies it against negligence claims, the surety will seek
8 reimbursement from the trustee of the cost of a successful defense,
9 and that the trustee in turn will be entitled to an administrative
10 claim for that expense. That may be, in a given case. However,
11 legal expenses are an ordinary aspect of bankruptcy cases, and the
12 Trustee makes no showing why estate money should be spent to
13 indemnify against them.

14 In theory a trustee might demonstrate that a particular case
15 presents such extraordinary challenges or risks of liability that
16 the trustee should be entitled to acquire errors and omissions
17 coverage as a condition of the trustee's acceptance of the case.²
18 However, the Trustee does not make out that sort of case here. As
19 noted by the Williams Court, an expense should not be deemed to be
20 "actual" if it is part of a formulaic allocation of general expense
21 over all the trustee's cases. While this case is clearly larger
22 than most, there is nothing in this record to demonstrate that it

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24 ²Consider, however, the admonition of the Supreme Court: "The most effective
25 sanction for good administration is personal liability for the consequences of
26 forbidden acts..." Mosser v. Darrow, 341 U.S. 267, 273-274, 71 S. Ct. 680, 95
L.Ed. 927 (1951), cited in In re Reich, 54 B.R. 995, 998 (Bankr. W.D. Mich. 1985)
This may be said to limit the right of a trustee to liability insurance at estate
expense in any case.

1 presented extraordinary circumstances justifying errors and
2 omissions coverage.

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IV. CONCLUSION

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The United States Trustee's objection is sustained. The Chapter 7 trustee's final account is approved in every other respect. In order to account for the insurance premiums, the Trustee's compensation shall be reduced by the sum of \$4,111.80.

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Counsel for the United States Trustee shall submit an order consistent with this opinion, which constitutes the Court's findings of fact and conclusions of law.

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FRANK R. ALLEY, III
Bankruptcy Judge

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