

DOCKET NUMBER: 96-11212

ADV. NUMBER: None

JUDGE: M. A. Mahoney, W. S. Shulman

PARTIES: Robert Stout, Jr., Linda Gale Stout, Lonnie Mixon, A. Richard Maples, Jr.

CHAPTER: 7

ATTORNEYS: A. Richard Maples, Jr.

DATE: 4/2/99

KEY WORDS: attorney for trustee and trustee fees

PUBLISHED:

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

ROBERT STOUT, JR.
LINDA GALE STOUT

Case No. 96-11212-MAM-7

Debtors.

**EN BANC ORDER APPROVING FINAL REPORT EXCEPT
DISALLOWING ATTORNEYS' FEES OF ATTORNEY
FOR TRUSTEE IN PART**

A. Richard Maples, Jr., Mobile, AL, Attorney for the Trustee
Lonnie Mixon, Daphne, AL, Trustee

This case is before the Court for the approval of the trustee's final account and approval of fees and expenses to trustee's attorney. This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. These matters are core proceedings pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the Court is approving the trustee's commission and expenses and is approving, in part, the fees and expenses of trustee's counsel. Mr. Maples is awarded \$150.00 in fees and \$16.60 in expenses.

FACTS

This chapter 7 case was handled by Mr. Lonnie Mixon, one of the trustees on the local chapter 7 trustee panel. He is not a lawyer. Mr. A. Richard Maples, Jr., was employed as attorney for the trustee with Court approval. The trustee collected \$1,270.80 in assets during his administration of the estate. The commission he is seeking is \$317.70 and he seeks \$5.14 in expenses.

Mr. Maples is seeking \$267.00 in attorneys fees and \$16.60 in expenses. His time was spent as follows:

Draft objections to 4 claims with negative notice and proposed orders	1.20 hours 45.00/hr	\$54.00
Review and revise objections to claims	.60 hours 155.00/hr	\$93.00
Letter to 1 claimant's attorney re withdrawal of claim	.20 hours 45.00/hr	\$ 9.00
Review and revise letter to attorney	.20 hours 155.00/hr	\$31.00
Compile time records and draft final fee application	.40 hours 45.00/hr	\$18.00
Review and revise fee application	.20 hours 155.00/hr	\$31.00
Appearance in court on fee application and final report	.20 hours 155.00/hr	\$31.00

The \$45 per hour rate is charged for the services of Mr. Maples' paralegal. The \$155 per hour rate is Mr. Maples'. His hourly rate for all work (bankruptcy and nonbankruptcy) has been \$155 per hour since January 1, 1998. The work in this case was performed from August 25, 1998 through February 23, 1999.¹

The four claim objections which Mr. Maples worked on were:

NAME OF CLAIMANT	TYPE OF OBJECTION
Citicorp	claim "filed as secured on property which is claimed as exempt and is not property of the estate"

¹Mr. Maples actually performed some services after February 23, 1999. He provided the Court with affidavits from attorneys about hourly rates and wrote a letter brief. The Court has not taken this time directly into account in awarding attorneys fees to Mr. Maples.

American General	same
University of South Alabama	duplicate claim
Mobile County Revenue Commissioner	late filed claim

No written responses to the claim objections were filed so that no hearings were held on any of the claims.

Mr. Maples provided evidence that other attorneys who practice in the bankruptcy courts and other courts charged between \$125-\$200 per hour in January 1998 and today. The average fee is clearly in the \$135-160 per hour range.

LAW

The Bankruptcy Administrator has objected to the fee application of Mr. Maples on two grounds: (1) the fees exceed the hourly rates established in the 1997 unpublished opinions of this Court; and (2) the services for which Mr. Maples seeks to be compensated are services which should be provided by the trustee as part of his duties compensated by his commission. Mr. Maples asserts that the attorney for the trustee ought to be compensated at his or her normal hourly rate for services performed and that the claims objection process requires the work of an attorney or the trustee would unlawfully be engaging in the practice of law as that term is defined in ALA. CODE § 34-3-6 (1997).

Section 330 of the Bankruptcy Code provides that “reasonable compensation for actual, necessary services rendered” should be awarded. Section 330(a)(3) sets forth five factors courts should consider in determining “reasonable compensation.” These factors are:

- (A) the time spent on such services;
- (B) the rates charged for such services;

- (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
- (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and
- (E) whether the compensation is reasonably based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Mr. Maples and the Bankruptcy Administrator presented evidence and arguments on factors C and E. There was no dispute about the other factors.

A.

The Bankruptcy Administrator's objection to the hourly rates of Mr. Maples is rooted in a 1997 unpublished opinion of this Court. In that ruling, both judges held that \$125-\$135 per hour for routine legal work and \$140 per hour for more complex work would be reasonable rates for trustees' counsel in this district.

The rate lawyers charge for comparable nonbankruptcy services is one of the bases for what should be charged to bankruptcy estates. The Bankruptcy Administrator's Office even indicated in its post-trial brief that "[a]dmittedly, the \$135 rate may need some upward adjustment to account for inflation." The rate to be used is a community-wide rate for similar counsel doing similar nonbankruptcy work. The evidence showed that \$140-150 per hour for routine work and \$155 per hour for more complex work is appropriate. Attorneys charged these rates in other cases in 1998 and charge them now. These rates are especially appropriate when the attorney uses a paralegal to perform some of the less complex work at a lower hourly rate. *See In re Busy Beaver Bldg. Centers, Inc.*, 19 F.3d 833 (3rd Cir. 1994) (holding that paralegal services should be compensated if usually compensated in nonbankruptcy cases).

B.

Trustee's counsel raises the issue that trustees would be engaged in the unauthorized practice of law if they prepared and filed claim objections in the bankruptcy courts of Alabama.

ALA. CODE § 34-3-6 (1997) forbids people who are not licensed attorneys from the following activities:

1. [Appearing] in a representative capacity . . . as an advocate or [drawing] . . . papers, pleadings or documents, or [performing] . . . any act in connection with proceedings pending or prospective before a court or a body, board, committee, commission or officer constituted by law or having authority to take evidence in or settle or determine controversies in the exercise of the judicial power of the state or subdivision thereof; or
2. For a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect . . . [drawing, procuring, or assisting] . . . in the drawing of a paper, document or instrument affecting or relating to secular rights; or
3. For a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, [acting] . . . in a representative capacity in behalf of another tending to obtain or secure for such other the prevention or the redress of a wrong or the enforcement or establishment of a right; or
4. As a vocation, [enforcing, securing, settling, adjusting or compromising] . . . defaulted, controverted or disputed accounts, claims or demands between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense.

It could be argued that many of the duties of a Chapter 7 trustee fall under these definitions. A trustee's duty to object to claims requires papers to be drawn and filed in court. Claim objections or objections to exemption affect the debtor and creditor's secular rights. A trustee's claim objections may be said to result in the redress of wrongs (i.e., incorrect claims) and enforcement of rights (i.e., the determination of priorities of liens). Finally, a trustee by filing claims objections oftentimes settles or compromises disputed claims among creditors.

Does ALA. CODE § 34-3-6 (1997) apply to federal courts and/or Chapter 7 trustees?

“Federal courts have undisputed, inherent authority to regulate practice in cases pending before them.” *State Unauthorized Practice of Law Committee v. Paul Mason & Associates, Inc.*, 159 B.R. 773, 776 (N.D. Tex. 1993) (“*Paul Mason I*”). See also *Chambers v. Nasco, Inc.*, 501 U.S. 32, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991). Bankruptcy courts also have the inherent power since they are units of the federal district courts. 28 U.S.C. § 151.

If federal law or rules conflict with state law or rules, the federal law preempts state licensing and disciplinary requirements. *Sperry v. Florida ex rel Bar of Florida*, 373 U.S. 379, 385, 83 S. Ct. 1322, 1325 10 L. Ed. 2d 428 (1963). In *Sperry*, the Florida Bar asserted that Sperry was practicing law in Florida without a license in violation of its state statutes. Sperry was registered with the United States Patent Office as a “registered patent agent.” As such he could “advise and assist [persons seeking patents] in the presentation and prosecution of their applications.” *Id.* at 384-85, 83 S. Ct. at 1325-26. The Bar argued that he could not assist Florida applicants because it would constitute unauthorized practice of law. The Supreme Court held that Sperry could assist Floridians in applying for patents because federal law allowed it. The State of Florida’s contrary law was preempted. The Supreme Court stated:

A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give “the State’s licensing board a virtual power of review over the federal determination” that a person or agency is qualified and entitled to perform certain functions . . .

Sperry, 373 U.S. at 385, 83 S. Ct. at 1325.

In the *Paul Mason* case, the Unauthorized Practice of Law Committee of the Supreme Court of Texas asserted that an agent for creditors in bankruptcy cases violated Texas’ unauthorized practice of law statute. TEX. GOV’T CODE ANN. § 81.102. Paul Mason’s business,

Creditors Bankruptcy Service (“CBS”), filed proofs of claim, monitored case status, and contacted debtors about whether they wanted to reaffirm their debts rather than surrendering the collateral. The District Court and Fifth Circuit Court of Appeals agreed that CBS’s actions were allowed pursuant to Fed. R. Bankr. P. 9010 and therefore, due to preemption, Texas could not prevent CBS’s practices. *State Unauthorized Practice of Law Committee v. Paul Mason & Assoc., Inc.*, 159 B.R. 773 (N.D. Tex. 1993), *aff’d* 46 F.3d 469 (5th Cir. 1995) (“*Paul Mason II*”).

This Court concludes that requiring trustees to file claim objections is explicitly authorized by federal statute and the statute preempts state law to the contrary. 11 U.S.C. § 704(5) states that the trustee shall “if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper.” If the State of Alabama were allowed to preclude nonlawyer trustees from objecting to claims in bankruptcy courts, it would accomplish precisely what the Supreme Court held was impermissible in *Sperry*. *Supra*. “No state law can hinder or obstruct the free use of a license granted under an act of Congress.” *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518, 566, 14 L. Ed. 249 (cited in *Paul Mason II* case).

This result is logical as stated in *Paul Mason I*:

The state standards for the unauthorized practice of law do not easily apply to the bankruptcy court because the State of Texas does not have a state analog to the federal bankruptcy court. . . . The federal courts must be able to exercise this inherent power and make determinations as to what is or is not the practice of law free from the licensing requirements of the State of Texas. Federal courts cannot defer to states when making determinations as to who may perform which acts in furtherance of the administration of justice.

Paul Mason I, *supra* at 780. Trustees are paid on a commission basis to accomplish what section 704 of the Bankruptcy Code requires. “An attorney is never entitled to professional compensation for performing duties which the statute imposes on the trustee.” *In re Shades of*

Beauty, Inc., 56 B.R. 946, 949 (Bankr. E.D.N.Y. 1986). If trustees were required to hire counsel to accomplish some or all of the functions listed under § 704 in all cases, then the purpose of having a trustee would be lost or undermined. The trustee could receive a commission for doing little work. The trustee would be reduced to a manager of attorneys. This is not what trustees were intended to do. They are to manage and liquidate the estate themselves except when nonroutine situations arise which require counsel. Performance of the duties specifically listed in 11 U.S.C. § 704 is mandated by federal law. This law preempts state law to the contrary.

C.

The most difficult issue for the Court is scrutinizing the actual work done and determining whether it is work that trustees should do without an attorney. Even though trustees are statutorily required and permitted to object to objectionable claims, there will be situations when legal representation will be necessary. This includes appearances in court on contested claim objections. The Court agrees with a recent case which says “No black and white rule exists or should exist which dictates when a trustee can hire a lawyer and when a trustee cannot.” *In re Leslie*, 211 B.R. 1016, 1018 (Bankr. M.D. Fla. 1997). Section 704(5) requires trustees to object to claims filed by creditors when appropriate. In this case the objections were made on routine grounds that a trustee, whether an attorney or not, should be expected to know. Have claims been filed against exempt assets? Has a claim been filed after the bar date? Is the claim a duplication of another claim?

In an earlier opinion, *In re Bayou Marine Products Services, Inc.*, Case No. 93-11527-MAM-7 (Bankr. S. D. Ala. unpublished opinion dated April 11, 1997) (copy attached), the Court ruled that certain work of trustees was not complex and should not be done by trustees’ counsel.

This work included “claim objections for duplication, failure to itemize, timeliness, lack of completeness, and similar grounds.” *Id.* at 3-4. The Court’s opinion has not changed.

The case of *In re King*, 88 B.R. 768, 770 (Bankr. E.D. Va. 1988) states that “attorneys appointed to represent the trustee must exercise professional legal skills beyond the ordinary knowledge and skill of the trustee.” The court listed a number of cases finding certain tasks to be trustees’ duties. *Id.* at 770. Filing objections to claims is not listed. However, a 1997 Florida case, *In re Haggerty*, 215 B.R. 84 (Bankr. M.D. Fla. 1997), held that routine objections to claims were a trustee’s duty not compensable as professional time. This Court agrees.

Mr. Maples asserts that the negative notice procedure requires that attorneys draft the claim objections for trustees. The Court disagrees. The language required for a normal motion can be copied from the local rule or from prior objections. Taking the situation in the best light for trustees’ counsel, at most, an attorney for the trustee may be necessary to review the objection prepared by the trustee. The language required under the negative notice procedure is different than the language required in the past, but the objections are the same. Although not an issue in this case, the same is true for proposals to sell assets.

The Court is aware that being a trustee at this time is difficult even if one is an attorney. People are more aware of their legal rights and remedies than ever before. However, the Court does not believe that a statutory duty should be delegated to counsel unless there is some issue beyond the type found in this case. At worst, counsel should review everything a trustee files before he or she files it. Once an objection is filed to a claim or sale, an attorney may be needed. Trustees must use their discretion as to when an attorney is necessary and the Court will not second guess them in most instances. Hindsight is always easier. However, counsel should not be taking over trustees’ duties in all cases and charging a higher fee. It is not what the statute

contemplates or the creditors deserve. Therefore, scrutiny of the decision to utilize counsel will be necessary at times.

[I]t would be as erroneous to award compensation at attorney rates for services that are duties of the trustee as it would be to fail to award compensation to a trustee who rendered services as an attorney separately from duties as a trustee. In the first instance the inequity would be in unjustly enriching the trustee at the expense of the estate's other claimants and in the second instance the inequity would be in unjustly enriching the estate at the expense of the attorney. While the above statement might appear to be mere tautology, it establishes a parameter for the court's decision in an area where there are often insufficient assets to satisfy all claimants and the court is typically called upon to balance competing claims to the already insufficient fund.

In re Vlachos, 61 B.R. 473, 479 (Bankr. S.D. Ohio 1986).

Drafting four claim objections and orders at \$54 was not necessary work of Mr. Mixon's counsel nor was all of the review and revision of claims at \$93. The Court is unclear what the letter to claimant's counsel entailed. Whether the work was legal work is uncertain. Trustee's counsel bears the burden of proof. *In re Bradford*, 201 B.R. 918, 919 (Bankr. S.D. Ohio 1996). He did not meet it. Therefore the \$40 in fees for the letter are denied. The Court will allow \$70 in attorneys fees for review of the claim objections and orders and will allow \$80 for preparation of the fee application and attendance at court.²

CONCLUSION

As part of their statutory duties, trustees should prepare and file routine or uncomplicated claim objections and proposals for sale of assets. However, at times, trustees will need counsel. When hired and utilized, trustees' counsel should be adequately paid for the work they perform. The standard for their fees is established in 11 U.S.C. § 330. In this case, at

² Although the fee application preparation is more routine than complex work, Mr. Maples' hourly rate is tempered by the modest \$45 per hour rate for his excellent paralegal and the unbilled time noted in footnote 1. Therefore, the rate is not reduced.

this time, \$140-\$150 per hour for routine work is appropriate; \$155 per hour for more complex work is reasonable.

THEREFORE IT IS ORDERED:

1. The commission and expenses of Lonnie Mixon, the trustee, are APPROVED;
2. The expenses of the Clerk of Court are APPROVED;
3. The fees of A. Richard Maples are approved in the amount of \$150.00

and expenses of \$ 16.60 are APPROVED.

4. Otherwise, the fees of A. Richard Maples are DENIED.

Dated: April 2, 1999

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE

WILLIAM S. SHULMAN
U.S. BANKRUPTCY JUDGE

DOCKET NUMBER: 93-11527, 94-12329, 95-12836

ADV. NUMBER: None

JUDGE: M. A. Mahoney, W. S. Shulman

PARTIES: Bayou Marine Products Services, Inc., Sally Gloria Sirmon, George G. Brewer

CHAPTER: 7

ATTORNEYS: B. A. Friedman

DATE: 4/11/97

KEY WORDS:

PUBLISHED:

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

BAYOU MARINE PRODUCTS SERVICES, INC.
SALLY GLORIA SIRMON
GEORGE G. BREWER

Case No. 93-11527-MAM-7
Case No. 94-12329-MAM-7
Case No. 95-12836-MAM-7

**EN BANC ORDER APPROVING FINAL ACCOUNTS AND
REDUCING FEES FOR ATTORNEY FOR THE TRUSTEE**

Barry A. Friedman, Trustee and Attorney for Trustee
Mark S. Zimlich, Bankruptcy Administrator Attorney

These cases are before the Court for approval of the Trustee's final reports and for award of compensation to Trustee's counsel. Barry A. Friedman is the trustee in each case and he is also the attorney for the trustee in each case. A hearing was held. Appearances are as noted in the record. The Court has jurisdiction to hear these matters pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. These matters are core proceedings pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the Court is approving the final reports with a reduction in the attorneys fees awarded as to each case as indicated below.

The judges of this Court also determined that review of this issue en banc would be appropriate. The applications for compensation of the attorney for the trustee before the Court are similar to those filed in numerous other cases before both judges. The judges both hold the views expressed below.

FACTS

Barry A. Friedman seeks the following attorneys fees in each case:

Bayou Marine Products Services, Inc.	-	\$2,835.00
Sally Gloria Sirmon	-	\$1,170.00
George G. Brewer	-	\$ 330.75

In each case, the Bankruptcy Administrator objected to allowance of a portion of the fees requested. The objection is that some work in each file which the trustee alleges is attorney

work is actually trustee work. Trustee work is compensated by the formula established in 11 U.S.C. § 326.

Bayou Marine Products Services, Inc.

Mr. Friedman claimed the following amounts relevant to the Bankruptcy Administrator's objection:

6/28/95	Received and calendared Claims Bar Date	.1 hr.
9/26/95	Requested Claims Register from Clerk	.25
9/27/95	Received and reviewed Claims Register	.75
3/25/96	Preparation and filing of Claim Objection re City of Mobile Claim (alleging duplication)	.25
5/20/96	Received and reviewed the Claim Order	.1

He sought compensation at \$150 per hour.

Sally Gloria Sirmon

Mr. Friedman claimed the following amounts relevant to the Bankruptcy Administrator's objection:

7/9/96	Preparation and filing of Claim Objection (alleging duplication)	.25
7/26/96	Received and reviewed Claimant's attorney's letter	.1
7/31/96	Received and reviewed Claimant's attorney's letter	.1
8/14/96	Received and reviewed Claim Order	.1

Mr. Friedman charged \$150 per hour as attorney for the trustee.

George G. Brewer

Mr. Friedman claimed the following amounts relevant to the Bankruptcy Administrator's objection:

4/10/96	Requested Claims Register from Clerk	.25
5/2/96	Received and reviewed Claims Register	.25

Mr. Friedman charged \$135 per hour as attorney for the trustee.

LAW

Section 704 of title 11 of the United States Code states what the duties of a trustee in a chapter 7 bankruptcy case are. The duties include: “if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper.” 11 U.S.C. § 704(5). The time listed above was spent in reviewing and objecting to claims in furtherance of this duty.

Mr. Friedman argues that the duties of a trustee at times require the services of an attorney. Evaluation of the merits of claims such as these was done by him in his attorney capacity. The Bankruptcy Administrator contends that every trustee must request the claims register in his or her cases and determine if there are claims which are objectionable pursuant to the duty imposed under Section 704. The Bankruptcy Administrator also states that only if the trustee has issues which raise legal concerns does a need for an attorney arise. If an objection is based upon “duplication,” there is no real legal issue involved and no attorney is needed.

When a trustee acts as his own attorney, it is sometimes difficult to determine when one quits acting as trustee and commences acting as attorney. The roles blur. Certainly, there are many activities of a trustee which the attorney for the trustee is also able to perform. The Court’s role is to balance the creditors’ desire for the largest distribution with the need of the trustee and court system for the expertise and safety offered by appropriate attorney involvement in cases. Both asset preservation and protection are necessary.

The Court concludes that requesting and initially reviewing Claims Registers is a trustee duty which cannot be compensated as an attorney’s duty. Until a trustee determines there are any questionable or objectionable claims, there is no need for attorney involvement. The Court also concludes that claim objections for duplication, failure to itemize, timeliness, lack of completeness, and similar grounds are trustee work. These objections do not require the

expertise of an attorney to prepare in most instances. Finally, the Court concludes that reviewing claim orders is also a trustee function since review is necessary for the trustee to make the final report and file a final account pursuant to 11 U.S.C. § 704(9).

As stated in an earlier opinion, for routine legal work in chapter 7 cases, the Court concludes that \$135 per hour is an appropriate attorneys fee.

THEREFORE IT IS ORDERED that:

1. The final report in the Bayou Marine Products Services, Inc. case is approved except that the fees of the attorney for the trustee are reduced to \$2,355.75; and
2. The final report in the Sally Gloria Sirmon case is approved except that the fees of the attorney for the trustee are reduced to \$978.75; and
3. The final report in the George G. Brewer case is approved except that the fees of the attorney for the trustee are reduced to \$263.25.

Dated: April 11, 1997

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE

WILLIAM S. SHULMAN
U.S. BANKRUPTCY JUDGE