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Bankruptcy - Attorney's Fees Under The 1963 Amendment To 860(d) Of The Bankruptcy Act. Levin and Weintraub v. Rosenberg, 330 F.2d 98 (2d Cir. 227 1964)

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Bankruptcy—ATTORNEY'S FEES UNDER THE 1963 AMENDMENT TO § 60(d) OF THE BANKRUPTCY ACT. Section 64(a) 1 of the Bankruptcy Act[1] makes provision for counsel fees to be assessed in bankruptcy cases:

> . . . one reasonable attorney's fee for the professional services actually rendered . . . to the bankrupt in voluntary and involuntary cases, and to the petitioning creditors in involuntary cases . . .

Section 60(d), prior to the 1963 amendment provided:

> If a debtor shall, directly or indirectly in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney . . . for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor . . .[2]

The first paragraph of the 1963 amendment[3] now provides that the court on its own motion may examine and determine reasonable counsel fees, as well as by petition by the trustee or creditor of the bankrupt. An additional paragraph was added to 60(d):

> If, whether before or after filing, a debtor shall agree orally or in writing to pay money or transfer property to an attorney at law after the filing, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the bankrupt made prior to discharge and shall be held valid only to the extent or a reasonable amount to be determined by the court, and any excess obligation shall be cancelled, or if excess payment or transfer has been made, returned to the bankrupt.

This amendment, and the reason for its enactment by Congress, was discussed in *Levin and Weintraub* v. *Rosenberg*.[4] Appellants, counsel for the bankrupt, appealed reduction of their attorney's fees from $2,550 to $750 by the District Court. The fees had been reduced because the size of the estate had been depleted by high administrative costs. Appellants contended that their drafted petition in bankruptcy had been on file with the court for more than two years before any claim had been instituted by the defendant trustees to have counsel fees reduced;

1. 11 U.S.C.A. § 104(a).
2. 11 U.S.C.A. § 96(d).
3. 11 U.S.C.A. § 96(d).
4. 330 F.2d 98 (2d Cir. 1964).

they further alleged that defendant's claim was barred by the statute of limitations under section 11(e):

> A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy.[5]

The referee held that the 1963 amendment, authorizing the court to review attorneys' fees on its own motion, was not subject to the statute of limitations under section 11(e). The Court of Appeals in deciding whether the 1963 amendment was covered by the two year statutory period, discussed the intent of Congress in amending section 60(d). In Senate Report 144,[6] the Committee on the Judiciary stated that the amendment would serve "to strengthen the provisions of the Bankruptcy Act governing the review of attorneys' fees by the bankruptcy court." [7] The Committee revealed certain abuses which had been brought to its attention during hearings on the proposed amendment: (1) Debtors were signing notes for excessive fees in no asset or nominal asset cases, since the allowable fee to the attorney would be small. (2) Attorneys often failed to assess their own fees justly, or dispute those charged by their associates. (3) Lesser claimants and general creditors were also charged excessive fees, because the amount recovered would be small, and the bankrupt's estate had been considerably expended by priority claimants in many instances.

Appellants argued, however, that the court's investigation of counsel fees on its own motion actually was derived from the power of the bankrupt's trustee to file a claim for reduction of fees, and the court, therefore, should be subject to the same limitations as the trustees are under section 11(e). The court rejected this theory on two grounds: (1) There is no provision under section 11(e) which in any way prevents the court from re-examining counsel fees. (2) Congressional intent, manifested by the 1963 amendment to section 60(d), was to expand the

5. 11 U.S.C.A. § 29(e). "The two year period of limitation upon suit brought by receivers and trustees now runs from the date of adjudication, but these officials may also avail themselves of any longer periods of limitation provided by non-bankruptcy laws." HANNA AND MACLACHLAN, THE BANKRUPTCY ACT, ANNOTATED 25 (7th Ed. 1961).

6. U.S. CODE CONG. AND ADMIN. NEWS 637, 88th Cong., First Sess. (1963).

7. *Id.* at 637.

authority of the courts in reviewing counsel fees, not to limit it under section 11(e).

The court considered the amount of time spent on the case by the appellants, and their professional reputation, but cited *Rosenburg* v. *United States*[8] in upholding reduction of their fees:

> . . . Even though these professional services were well performed and helpful, we think the only realistic course in bankruptcy collections is that allowances must be limited—as they are by customary practice—to a reasonable percentage of the recovery . . .

The term "reasonable fee" as stated in section 64(a)1, has evoked much comment from the courts respecting standards to be applied in determining reasonable counsel fees. Now that section 60(d) provides for courts assessing fees on their own motion, attorneys' fees in bankruptcy cases will be more subject to scrutiny than in the past, and criteria used for their determination will become more apparent. Two cases, however, perhaps will serve as valuable guidelines to attorneys handling bankruptcy matters. In *Levin* v. *Barker*,[9] the court said:

> Many elements may properly be taken into consideration in determining a reasonable fee for services rendered by an attorney [in bankruptcy cases]. Among these may be named (1) the time spent; (2) the intricacy of the questions involved; (3) the size of the estate; (4) the opposition encountered; (5) the results obtained; and (6) the economic spirit of the Bankruptcy Act.

Counsel fees in relation to the "economic spirit of the Bankruptcy Act" were discussed in detail in *In Re Consolidated Distributors, Inc.*:[10]

> It is most important in the administration of the Bankruptcy Act to observe that the language of the Act makes it a duty of the courts to see that the fees paid to the attorneys shall be "reasonable." We construe the word "reasonable" in this connection to mean that the allowance which can be made to an attorney for services rendered in a bankruptcy proceeding must be such as will fairly compensate him for the service he has rendered and from which the general body of creditors has benefitted. In all cases the sine qua non of the allowance

8. 242 F.2d. 141, 142 (2d Cir. 1957).

9. 122 F.2d 969 (8th Cir. 1941), *cert. denied* 315 U.S. 813 (1941).

10. 298 Fed. 859, 862 (2d Cir. 1924).

> is the benefit the bankrupt's estate and its creditors have derived from the services rendered.

The court concluded its opinion with a financial summary which showed a balance of $4,200 out of gross assets of $19,000; against this balance were claims of allowances for $5,500, and priority claims of over $50,000. Nothing was available for general creditors. On the basis of these figures, the court thought it was reasonable to reduce the appellants' fees from $2,500 to $750.

Bankruptcy courts under section 60(d) now have more latitude than ever before in assessing fair and reasonable attorneys' fees. *Levin and Weintraub* v. *Rosenberg*[11] involved a substantial reduction in fees, and it is immediately evident that courts handling bankruptcy matters have already strongly considered Congressional intent and the spirit of the Bankruptcy Act—to assess fees so as to give the greatest benefit to the creditors, and at the same time, to protect the bankrupt from further depletion of his estate.

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Constitutional Law—Freedom of Religion—Hallucinogens: The Right to Simulated Spiritualism. The Native American Church of California has no membership requirements, no church records, no recorded theology, but has an estimated membership of 30,000-250,000 Indians. The religion of the Church embraces the consumption of an hallucinogen, lophophora, better known as peyote. Lophophora embodies the Holy Spirit and the partaker enters into contact with the Deity. The clinical effects of the consumption of lophophora are manifold. Varying with the individual, it ordinarily produces two stages: in the first, it acts as a stimulant causing wakefulness with physical and mental exhilaration, and, in the second, as a depressant causing an intoxication with accompanying visions and hallucinations.

During a service, defendants in *People v. Woody*,[1] were apprehended and charged with the unlawful possession of lophophora in violation of Section 11500 of the Health and Safety Code.[2] They pleaded not guilty,

11. *Supra* note 3.

1. People v. Woody, 40 Cal. Rptr. 69, 394 P.2d 813 (1964), reversing 35 Cal. Rptr. 708.

2. Cal. Health and Safety Code, § 11500; § 11540 specifically prohibits the possession of lophophora.