

In re Decor Corp.Bkrcty.S.D.Ohio,1994.
United States Bankruptcy Court,S.D. Ohio,Eastern
Division.

In re DECOR CORPORATION, Debtor.
Bankruptcy No. 93-56830.

Aug. 22, 1994.

Chapter 11 debtor's law firm applied for compensation. The Bankruptcy Court, [Charles M. Caldwell](#), J., held that recovery of prepetition fees and expenses had to be limited to compensation for matters routinely and immediately attendant to Chapter 11 filing.

So ordered.
West Headnotes

[1] Bankruptcy 51 3200

51 Bankruptcy

51X Administration

51X(E) Compensation of Officers and Others

51X(E)3 Attorneys

51k3191 Amount

51k3200 k. Effect of Contract; Prior Compensation. **Most Cited Cases**

Chapter 11 debtor's law firm that, as condition of employment, returned preference period fee payments to establish disinterestedness and avoid being preference defendant was entitled to award of only \$24,625 of \$47,930.75 in claimed prepetition fees, which represented petition and "first day" documents preparation and other matters routinely and immediately attendant to advent of Chapter 11 filing.

[2] Bankruptcy 51 3187(1)

51 Bankruptcy

51X Administration

51X(E) Compensation of Officers and Others

51X(E)3 Attorneys

51k3180 Items and Services

Compensable

51k3187 Expenses

51k3187(1) k. In General. **Most**

Cited Cases

Chapter 11 debtor's law firm that, as condition of employment, returned preference period fee payments to establish disinterestedness and avoid being preference defendant was not entitled to recover any expenses for prepetition services, where bankruptcy court could not determine portion of expense request that pertained to petition and "first

day" documents preparation and other matters routinely and immediately attendant to advent of Chapter 11 filing.

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[Ronald M. Tucker](#), M.S. Management Associates,
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John Urie (Interim Chairperson), Committee of
Unsecured Creditors, Paramus, NJ.

*MEMORANDUM OPINION AND ORDER ON
FIRST APPLICATION OF BENESCH,
FRIEDLANDER, COPLAN & ARONOFF FOR
ALLOWANCE OF INTERIM COMPENSATION
AND REIMBURSEMENT OF EXPENSES AS
COUNSEL FOR THE DEBTOR FOR THE PERIOD
MAY 4, 1993, THROUGH MARCH 31, 1994*

[CHARLES M. CALDWELL](#), Bankruptcy Judge.
On November 10, 1993, Decor Corporation dba The
Art Works and dba The Picture Show, an Ohio
Corporation ("Debtor") filed a voluntary petition for
reorganization under *290 chapter 11 of the United
States Bankruptcy Code. The Debtor is engaged in
the manufacture and retail sale of moderately-priced
art through retail outlets in sixteen states and the
District of Columbia. On February 16, 1994, the
Court entered a Memorandum Opinion and Order
("retention order") with reference to the appointment
of Benesch, Friedlander, Coplan & Aronoff
("BFCA") as counsel for the Debtor.

In relevant part, the retention order addressed the
propriety of the retention of BFCA based upon its
receipt of the sum of approximately \$53,906.00 from
the Debtor for prepetition legal services. The Court
concluded that in the absence of the ability of the
Debtor to pay prepetition, BFCA would have been a
creditor of the estate and disqualified under §
101(14)(A) of the United States Bankruptcy Code.
Under such circumstances, the statutory
disqualification could only be cured by a waiver of

BFCA's prepetition claim. The Court concluded that
this status was avoided by BFCA's receipt of
payments from the Debtor within the ninety (90) days
prior to the filing, and such transfers may constitute
preferential payments.

The Court held that BFCA's role as a potential
preference defendant constituted a disqualifying
adverse interest and rendered it ineligible to claim the
status of a "disinterested" professional as BFCA loses
its ability to independently and objectively represent
the Debtor. The Court further concluded the receipt
of the funds immediately prior to the filing, including
the wire transfer on the day of filing of a substantial
sum, created an appearance of impropriety, adversely
impacting upon the integrity of the bankruptcy
process premised upon preservation of estate assets
and equitable distribution.

The Court weighed these factors against the fact it is
inevitable that in any chapter 11 case of this
magnitude there will be some prepetition
involvement, and that counsel should not be
automatically penalized because of such
relationships. Further, the Court weighed the factor
that BFCA was the Debtor's counsel of choice and
had the most knowledge of the case, thereby
increasing the likelihood of a successful
reorganization.

In considering these circumstances, the Court
concluded that the appropriate balance to strike was
to require the immediate repayment of all prepetition
sums received by BFCA as a prerequisite to its
retention. Once this was accomplished, and a first
interim award request was made, the Court would
consider allowance for that prepetition work that
could be characterized as inevitable in all chapter 11
cases; *i.e.*, petition preparation and the associated
"first day" papers. This decision is in line with the
case of [In re Watson](#), 94 B.R. 111, 114
(Bankr.S.D. Ohio 1988), in which an extremely
limited exception to disqualification, due to
prepetition financial involvement, was carved out to
allow for work routinely undertaken to facilitate
bankruptcy filings.

[1] In compliance with the retention order, BFCA
returned the prepetition funds to the Debtor, and on
April 29, 1994, filed the instant interim application.
In this application, BFCA seeks interim
compensation in the amount of \$142,275.50 for
postpetition legal services and the amount of
\$17,871.35 for postpetition expenses incurred
between November 10, 1993, and March 31, 1994.
In addition, BFCA seeks compensation in the amount

of \$47,930.75,^{FN1} for prepetition legal services and the sum of \$1,810.96 for prepetition expenses incurred between May 4, 1993, and November 9, 1993. The Court has no difficulty with the postpetition fees and expenses requested, and they are awarded in full. The Court, however, as a consequence of the retention order and in its spirit, will not award all requested prepetition fees and expenses.

FN1. BFCA indicates that this sum reflects \$4,611.00 in prepetition fees not previously billed to or paid by the Debtor, and the sum of \$8,775.25 it has voluntarily written off as prepetition services not directly related to the filing.

The Court has reviewed the itemized statement for prepetition services and concludes that a considerable portion of the work does not fit within the extremely narrow exception discussed above. Specifically, many of the services appear to relate to general corporate representation and to representation generally essential to corporate restructuring. *291 Further, the Court concludes that in order to appropriately limit the exception, allowable services must have been performed immediately prior to the filing. As the Court understands the position of BFCA, it suggests a significantly greater portion of the work directly related to the chapter 11 filing that was always contemplated, and that the timing of the filing in November 1993, was expedited due to changes in the tax laws that would adversely affect the reorganization of the estate.

While the Court understands and in no way doubts this explanation and motivation, it does not address the concern that BFCA has avoided disqualification as a prepetition creditor by receiving a substantial payment that might subject it to pursuit as a prospective preference defendant. Such explanations further do little to improve the appearance of the receipt of substantial fees prepetition, including the wire of a substantial sum on the day the chapter 11 was filed. As a prospective defendant, counsel in such instances lose their ability to independently and

objectively represent debtors. See *In re American Thrift & Loan Ass'n*, 137 B.R. 381, 388 (Bankr.S.D.Cal.1992); *In re 419 Co.*, 133 B.R. 867, 869-870 (Bankr.N.D.Ohio 1991).

[2] The Court in its review of the itemized statement for prepetition services, provided as attachment C-1 to the application, has concluded that the sum of \$24,625.00 may be awarded.^{FN2} This sum is based upon the Court's analysis that the services involved fit within the narrow exception of petition and "first day" documents preparation and other matters routinely and immediately attendant to the advent of a chapter 11 filing of this magnitude. Because the Court is unable to discern the portion of the prepetition expense request that pertains to the compensable legal services, none of the requested prepetition expenses will be allowed.

FN2. Those entries that the Court has deemed compensable are separately identified on an attachment to this order.

The Court recognizes its ruling on the prepetition services and expenses may seem unfair to BFCA, especially in view of the recent confirmation of the plan in less than one year from filing. The results are admirable. The Court, however, is more concerned that to do otherwise would render meaningless the bankruptcy concepts of "disinterestedness" and "adverse interest" and call into question the integrity of the process for the sake of convenience. At the end of the day, the paramount concern has to be that debtors obtain and retain counsel that have no other interest or concern other than what is in the best interest of the estate. Debtors, as fiduciaries obligated to act in the best interests of creditors, must have counsel unfettered by any personal or financial concerns.

It is hereby ORDERED that BFCA is awarded interim fees in the total amount of \$166,900.50 and is awarded reimbursement for expenses in the amount of \$17,871.35.

IT IS SO ORDERED.